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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Are "make whole" orders of the National Labor Relations Board extended to nonunion employees employed after expiration of the collective bargaining agreement in excess of the remedial authority conferred by the Board by Section 10(c) of the National Labor Relations Act?

2. Are "make whole" orders of the Board by which the employer is required to make backpay payments to employees and benefits payments to the union trust funds for nonunion employees who may never receive any benefits therefrom impermissibly penal and confiscatory and, therefore, not made to effectuate the objectives of the National Labor Relations Act?

3. Are orders of the Board which require nonunion employees hired after expiration of the collective bargaining

agreement to join a closed shop employer or to lose their jobs void orders where such orders deny such class of employees of their due process and equal protection of the laws rights?

4. Has the Board, in applying and extending the provisions of Section 10(c) of the National Labor Relations Act to nonunion employees hired after the expiration of a collective bargaining agreement, grafted a new and different class of employees not intended to be covered by the Congress and has, therefore, legislated and usurped Congressional authority?

5. Has the Board, in denying the current nonunion employees hired after the expiration of the collective bargaining agreement any choice other than to join a closed shop employer or to be terminated, violated sections 7, 8 and 9 and other provisions of the National

Labor Relations Act under which the employees' freedom of choice in the formation and participation of unions is granted?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals were petitioner Peterson Painting, Inc., and the respondent National Labor Relations Board.

The parties to the proceedings before the National Labor Relations Board were petitioner Peterson Painting, Inc., and charging party District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers.

Petitioner Peterson Painting, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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The petitioner Peterson Painting, Inc., respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on November 14, 1986, as modified by Amended Memorandum of November 28, 1986, to delete from the original Judgment the words "argued and," and the Judgment of that court denying petitioner's Petition for Rehearing on December 17, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is an unpublished opinion reported only "as order enforced" at 804 F2d 1253. The text of the Court's Decision appears in the Appendix hereto, page 1a, infra.

The Decision of the National Labor Relations Board is reported as 277 NLRB 103 in C.C.H. NLRB Decisions, 1985. The text of the Decision of the Board appears in the Appendix hereto.

The Court of Appeals' Judgment denying Peterson Painting's Petition for Rehearing appears in the Appendix hereto.

JURISDICTION

The National Labor Relations Board had jurisdiction over the proceedings before it under Section 10(c) of the National Labor Relations Act, as amended, (29 U.S.C. 160 (c)) which vests the Board

with jurisdiction to issue orders remedying unfair labor practices. The Administrative Law Judge issued its Order and Decision on December 6, 1984, and petitioner timely filed his exceptions to his Decision and Order and a brief in support of his exceptions. General counsel for the Board and District Counsel of Painters No. 33, International Brotherhood of Painters and Allied Workers, filed briefs with the Board in support of the Administrative Law Judge's Decision. On November 29, 1985, the Board affirmed the Order and Decision of the Administrative Law Judge. On December 24, 1985, petitioner filed his Petition for Review with the Court of Appeals under 29 U.S.C. 160(c) and (f) to set aside or modify the Board's orders. Thereafter, the Board filed its cross-petition for enforcement of the Board's orders under 29 U.S.C. 160(e).

The Court of Appeals had jurisdiction to review, modify or set aside the Order of the Board under 29 U.S.C. 160(f).

The jurisdiction of this court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1) which provides that the Supreme Court may review cases in the Federal Courts of Appeal by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree.

STATUTE INVOLVED

Section 10(c) of the Act (29 U.S.C. 160(c)) provides that the Board, upon finding of an unfair labor practice by a person, to state its findings of fact and to issue an order requiring such person to cease and desist from such unlawful labor practice, and to take such

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

STATEMENT OF THE CASE

Petitioner Peterson Painting, Inc., is a California corporation engaged in the business of residential painting and Victor Peterson is the president of the corporation. Victor commenced business as Victor Peterson Painting in 1971 as a sole proprietorship until 1975 when he incorporated the business. In 1971 the company became a member of the Painting and Decorating Contractors Association of Central Coast Counties (PDCA), a multi-

employer association to whom he had given authorization to bargain collectively. By virtue of his membership in PDCA, petitioner was a party to a series of successive collective bargaining agreements with District Council 33 of the Brotherhood of Painters and Allied Trades, the most recent being effective from July 1, 1980 through June 30, 1983. Article 25 of the Agreement provided that the Agreement be in effect through June 30, 1983, and remain in effect from year to year thereafter, unless either party shall give notice to the other in writing of their desire to change or revise the agreement and that such written notice be presented to the other party not less than 120 days prior to the expiration date. Because of poor economic conditions in the fall of 1982, the union ordered to begin negotiations early for a new PDCA agreement. PDCA

members who did not want to be bound by a successor agreement were privileged to withdraw from the Association prior to the conclusion of the early negotiations. In accordance with his right under Article 25, petitioner informed the union in writing on December 8, 1982, that he withdrew bargaining authority of the PDCA for petitioner and that petitioner would not be bound by the 1980-1983 agreement past its expiration date of June 30, 1983. It is admitted that petitioner timely withdrew from the PDCA in accordance with Article 25 and that he was not bound by the new agreement. By letter dated January 24, 1983, petitioner again informed the union that he had withdrawn bargaining authority from the PDCA and that petitioner would not be bound by the 1980-1983 agreement past its expiration date of June 30, 1983. After petitioner sent his second letter, the

union wrote to petitioner on February 3, 1983, advising him that he was bound by the old contract through June 30, 1983, and was required to make the cost of living increases that became effective on January 1, 1983, until the contract expired. The union letter did not tell the petitioner that he could be held to the terms of the 1980-1983 agreement past its June 30, 1983 expiration date. The union letter did, however, request that petitioner contact the union to bargain for a new contract governing Peterson Painting, Inc. When petitioner did not respond to the union letter, the union on June 8, 1983, wrote petitioner indicating its willness to bargain with it for a new agreement. Again, this letter did not advise petitioner that it could be held to the terms of the 1980-1983 agreement past its June 30, 1983 expiration date.

On June 29, 1983, union negotiator Downey telephoned petitioner asking its intentions with respect to signing or negotiating a new contract and petitioner replied that it did not know what it was going to do until Shappell Industries, its principal customer, decided whether or not to put into effect a dual-gate system. They spoke by phone again on June 30, when Downey asked petitioner if he was going to sign a contract with the union and petitioner replied that it had not heard from Shappell but that petitioner was going to send some employees to the hiring hall so that they could be referred to other jobs.

On June 30, 1983, petitioner was doing a job at Moffett Field and, since his contract with the union expired on that date, the job superintendent advised that petitioner could not finish the job if petitioner was nonsignatory to a union

contract, and a union contractor would have to complete the job. Petitioner made arrangements with a union contractor to complete petitioner's Moffett Field job in the beginning of July 1983 and all of petitioner's employees on the Moffett Field job went to work for the union contractor to whom petitioner had assigned the completion of the Moffett Field job. These five men are named as the discriminatees in the Board action and the other alleged discriminatee, upon being advised that petitioner would not sign a new union contract, obtained a referral from the union hiring hall and went to work for a union employer.

Ken Lorentzen, the union's chief negotiator, admits that he had no contact with petitioner before June 30, 1983, regarding the negotiation of a new contract, his first contact coming at a meeting with petitioner on September 7,

1983 after the contract expired. Meanwhile, on August 9, 1983, Lorentzen authorized the placement of pickets against petitioner on the Shappell job without prior notice to petitioner, stating by said action the union was attempting to bring petitioner to the bargaining table.

It is undisputed that not once did union representative Downey or any other representative, from the time petitioner sent his letters stating he would not be bound past the June 30, 1983 expiration date of his contract with the union, tell petitioner that by operation of law the expired contract continued such that any unilateral changes by petitioner might constitute an unfair labor practice and that by operation of law petitioner was bound to keep in full force and effect the provisions of the expired contract. It is further undisputed that none of the

union officials called petitioner asking to meet where petitioner refused to meet with them.

Victor Peterson testified that when the contract expired on June 30, 1983, it expired, that petitioner had no contract to comply with after it expired, that its new employees asked for certain wage rates and petitioner judged them on their ability and paid them wages negotiated directly with these new nonunion employees and that petitioner also put into effect a new medical plan and an IRA plan for his new employees. With respect to petitioner's good faith belief that it had no contract with the union after its expiration date, trial counsel for the Board in her brief filed with the Administrative Law Judge stated, "Respondents had not presented any defense to this unlawful conduct, relying only on their mistaken beliefs that when

the collective bargaining agreement expired on June 30, their duty to bargain with the union terminated. Respondents' beliefs were in error..."

On July 1, 1983, Peterson stopped paying the wages and benefits set forth in the expired 1980-1983 contract and made no further payments to the union trust funds.

The Board concluded that petitioner violated Section 8(a)(1) by informing his employees in June of 1983 that it would become a nonunion employer; that petitioner violated Section 8(a)(3) by withdrawing recognition from and refusing to bargain with the union since July 1, 1983 and by unilaterally discontinuing and changing wages and benefits provided for in the expired agreement and by dealing directly with the new hirees concerning wages and benefits on and after July 1, 1983; and that petitioner

violated Section 8(a)(3) by constructively discharging his six employees on June 30, 1983.

The Board ordered that petitioner cease and desist from withdrawing recognition and refusing to bargain with the union on and after July 1, 1983, from discouraging membership in the union by constructively discharging employees and from advising employees that petitioner was to be a nonunion employer.

The Board further ordered that petitioner take the following affirmative action ostensibly necessary to effectuate the policies of the Act:

A. Upon request, bargain with the union as the exclusive representative of all employees.

B. Offer Joe Champlin, Bill Rose, Nat Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each

would have been in absent the discrimination against each, or if such position no longer exists, to a substantially equivalent position without prejudice to their seniority and other rights and privileges, and to make each of them, <u>and all employees employed on or after July 1, 1983</u>, whole for loss of pay or other benefits suffered by reason of the discrimination against each in the manner described in the section entitled, "The Remedy." The remedy provided that petitioner's make-whole obligations continue until petitioner and the union bargained to a new agreement or to an impasse.

C. Revoke the unilateral changes instituted on or after July 1 and reinstitute the terms and conditions of the expired 1980-1983 collective bargaining agreement with the union.

D. Pay into the benefit funds provided for in the 1980-1983 contract such sums that would have been paid into the funds on behalf of <u>such employees</u>, absent the illegal unilateral changes.

Petitioner contended first to the National Labor Relations Board and then to the Court of Appeals that the order to pay all of its new nonunion employees hired after July 1, 1983, the wages they would have received under the expired union contract and to pay the union trust funds all benefits for these nonunion hirees that they would have received under the expired agreement until petitioner and the union bargained to a new agreement or to an impasse was a Board order in excess of the Board's remedial authority conferred upon it under 29 U.S.C 160(c), and that such an affirmative order is not a remedial order contemplated by the Act, but rather is

punitive as to petitioner and grants a windfall to the union with no corresponding benefit to petitioner's new nonunion hirees. Petitioner conceded that the Board's order requiring it to offer reinstatement to its former six union employees and to make them whole, including payment of wages to them retroactively and payment into the union trust funds retroactively to July 1, 1983, was a proper order. However, petitioner contended that a bargaining order with respect to his new nonunion hirees, both as to wages and trust fund benefits, would be a sufficient and adequate remedy under the facts of this case such as to effectuate the policies of the Act, one of which is to encourage collective bargaining.

The Court of Appeals affirmed the Board's orders that petitioner pay all his new employees, all nonunion, hired

after July 1, 1983, the wages provided for in the expired contract and that petitioner pay to the union trust funds for these nonunion employees the trust fund payments specified in the expired contract with the union, retroactively and until petitioner reached a new agreement with the union or bargained to an impasse (Memorandum of Decision, page 5).

The Court of Appeals ruled as follows: "the Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, Stone Boat Yard vs. NLRB, 715 F.2d 441 (9th Cir. 1983), Cert. denied, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, Seattle Auto Glass vs. NLRB, 669 F.2d 1332 (9th Cir. 1982), and back

pay to newly hired replacement employees, Crest Floor and Plastics, Inc. vs. NLRB, 274 NLRB No. 185, enf'd men. 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion." (Memorandum of Decision, page 4, lines 19-26; page 5, lines 1-2)

The foregoing cases relied on by the Court for its decision are all factually different from the case at bench. This is a pivotal point in that none of the cases cited by the Court involved enforcement of Board wage and trust orders for all new nonunion hirees. Thus, the Court really did not address the issue of whether such orders exceed the Board's authority. Those were cited by the Board, distinguished by petitioner in its reply brief, and again in petitioner's Petition for Rehearing filed on November 28, 1986, and later denied. The Court of Appeals has not

really addressed the issue of whether Section 10(c) can be applied to the new nonunion hirees.

Petitioner has contended and does contend that Carpenter Sprinkler Corp. vs. NLRB, 605 F.2d 60 (2nd Cir. 1979) and Section 10(c) of Act precluded the broad affirmative orders involving the new hirees.

In that important case the employer instituted new wage and fringe benefit arrangements after he had withdrawn from the collective bargaining agreement and after it expired. All 19 of the employer's employees went on strike and the employer hired replacements for wages and put into effect new fringe benefits for the new employees. The Board ordered the reinstitution of the expired contract as to wages and required the employer to pay the fringe benefits to the union in accordance with the expired contract.

The Board also ordered that Carpenter continue to bargain with the union and to offer reinstatement to his former employees and pay them for any wages lost as a result of the unilateral changes.

However, the Board went further in Carpenter by making orders affecting the new employees and the Court struck and refused to enforce those orders providing for restitution remedies for the new employees. The Court noted that ordering the reinstitution of the expired contract for the new employees was improper, since the company was given no notice that it might be held for such back payments and that the new hirees were fully aware of the terms on which they were hired and, hence, the order of restitution for the new hirees was not warranted. The Court also noted that retroactive payments to the union funds was also inappropriate, since the order was unclear and since the

order made no allowance for offsetting these retroactive payments with the health and welfare benefits which the employer awarded during the period of time. The Court noted that, given the satisfactory bargaining history of the parties, the changes in the health and welfare benefits should have been the subject of bargaining between the parties and not simply ordered by the Board to be carried out. The Court noted also that the company felt strongly it could not afford the wages and fringe benefits at the level of the expired agreement and could not agree to the terms of the new agreement and, thus, it was unfair to hold the company to previous contract terms which caused it to withdraw from the multi-employer bargaining unit in the first place. The Court concluded that the financially crippling remedial action

of the type ordered by the Board would not be enforced.

The Court of Appeals purported to distinguish the Carpenter case on the basis that in that case there had been two bargaining sessions, a strike and the belief by the company that an impasse had been reached, and that none of those factors were present in the case at bar. Petitioner respectfully disagrees with the Court's conclusion that Carpenter is not applicable. Petitioner's job site was picketed by the union in August of 1983. Petitioner had withdrawn from the association because it could not survive under the terms of the expiring contract and it believed that when it expired it had no contract to live up to. The union did not advise that petitioner was incorrect in that assumption and that unilateral changes are an unfair labor practice.

Petitioner respectfully submits that Carpenter properly denied enforcement of orders extended to employees who were employed after the bargaining agreement expired and that the Court should apply that case to deny enforcement in this case. The resolution of the issue is important so that small companies, such as petitioner, may be made aware of the proper scope of the Board's remedial authority with respect to new hirees.

REASONS FOR GRANTING THE WRIT

I. THE NATIONAL LABOR RELATIONS BOARD'S ORDER CONTRAVENES THE NATIONAL LABOR RELATIONS ACT POLICY EXPRESSED BY CONGRESS AND IT IS, TO THAT EXTENT, AN INVALID ORDER.

The Board's broad authorization under the National Labor Relations Act to make orders only to the extent that they "can fairly be said to effectuate the

policies of the Act," does not confer absolute power on the Board to make _any_ order. While courts, including the Supreme Court, have indeed been reluctant to disturb the rather free reins of the Board, particularly in the area of remedial authority, _NLRB vs. 7-Up Bottling Co._, 344 U.S. 344, 346, 31 LRRM 2237, 2238 (1953); _Amalgamated Local Union 355 vs. NLRB_, 481 F.2d 996, 1006, 83 LRRM 2849, 2857 (2d Cir. 1973), the exercise of such broad powers has not been allowed to go unchecked. Rather, it can and it is measured against the Congressional policy or declaration of the purpose of the Act expressed in Section 1 of that Act. That policy envisions and mandates the accomplishment of three primary objectives: (a) free collective bargaining, (b) free choice in the selection of bargaining representatives and (c) freedom to engage

in, or refrain from, concerted activities for the mutual aid and protection of the employees. In order "to pass muster," so to speak, the Board's orders must be consonant with such objectives. Board's remedies which either fail to fall within or which conflict with any one of the said statutory directives, Consolidated Edison Co. of New York vs. NLRB, 305 U.S. 197, 3 LRRM 645 (1938), or which are punitive or confiscatory, Local 60 Carpenters vs. NLRB, 365 U.S. 651, 655, have been invalidated as serving no statutory purpose. Republic Steel Corp. vs. NLRB, 311 U.S. 7, 9-11, 7 LRRM 287, 289 (1940).

It is essential to examine some of the orders made in this case against such a backdrop in order to vindicate petitioner's steadfast position that (a) the Board's broad and undefined application of Section 10(c) of the Act

to current employees (i) violates one or more of the statutory objectives, (ii) violates the due process and equal protection of the laws rights of the new employees, in addition to violating the constitutional principle of separation of powers, (iii) punishes the employer rather than make the employees "whole," and (iv) unjustly enriches a union that does not come to the bargaining table with "clean hands" in failing to warn petitioner of the continued application of the terms of the collective bargaining agreement beyond its expiration date.

II. CONGRESS DID NOT INTEND THAT SECTION 10(c) BE APPLIED TO PETITIONER'S CURRENT EMPLOYEES.

Section 10(c) of the Act confers on the Board the power to award "affirmative action" to the aggrieved, including "reinstatement" of employees with or without pay and further including back

pay for such "reinstated" aggrieved employees.

The Board's orders in this case affect <u>two classes of employees</u>: (a) employees who were union members while employed by petitioner until June 30, 1983, the date upon which the collective bargaining agreement in question terminated and the date on which, as a result of subcontracting of a job, those employees left petitioner's employment to become employed by a subcontracting union employer. Petitioner does not object to the orders as they apply to such a class. The orders, however, are made <u>equally applicable</u> to (b) employees who sought and found employment with petitioner after June 30, 1983, at a time when petitioner believed, in good faith, to have become a nonunion employer and at a time when these new employees had no reason to believe other than that they

were being employed by a nonunion employer. It is as to this class of employees ("new employees" or "current employees" as opposed to the "old employees") that petitioner challenges the Board's orders.

The first such challenge is that it is clear from the language of Section 10(c) that the statutorily granted remedial authority to the Board is intended to be made applicable to those who were employed at the time of the unfair labor practice and who suffered from the resulting discrimination. Clearly, the remedy of "reinstatement," be it with or without pay or accompanied by back pay, was intended to apply to the "old employees," that is, those six who were in petitioner's employment until June 30, 1983, and who left his employ on or before that date as a result of petitioner's mistaken belief that the

company was free of the expired collective bargaining agreements. Those are the only ones who left and who could, therefore, be "reinstated."

"Make-whole" orders of the nature involved in this case, while authorized and long approved, Phelps Dodge Corp. vs. NLRB, 313 U.S. 177, 194, 8 LRRM 439, 446; Virginia Electric & Power Co. vs. NLRB, 319 U.S. 533, 541, 12 LRRM 439, 446; are, nonetheless, considered to be extraordinary remedies. In fact, Congress saw fit to carve it out of the generic "affirmative action," thereby evidencing the intent to treat "reinstatement" with more detail and precision.

The application of those provisions to the "current employees" does not represent the exercise of statutorily granted authority to effectuate the policies of the Act; rather, it

constitutes legislative grafting by a body with no authority to do so. To the extent, therefore, that the orders require a payment of back pay and payments to the union trust funds, the orders are void.

III. THE BOARD'S ORDERS, AS EXTENDED TO THE CURRENT EMPLOYEES, ARE VOID IN THAT THEY ARE VIOLATIVE OF ONE OR MORE OF THE CONGRESSIONALLY STATED OBJECTIVES OF THE NATIONAL LABOR RELATIONS ACT AND ARE FURTHER VIOLATIVE OF THE U. S. CONSTITUTION IN SEVERAL RESPECTS.

It is best to address the constitutional infirmities of the orders to show, somewhat more transparently, the clash between the objected orders and the stated objectives of the Act.

A. Violation of Due Process and of Equal Protection of the Laws.

Sections 7, 8 and 9 and other pertinent provisions of the Act provide for orderly procedures with respect to the selection of the appropriate bargaining units, representative election procedures, review of representative proceedings. Pivotal, among the many questions in all of this is hte fact that existing employees are given the opportunity to express themselves on such important issues as "agency shop" and "closed or union shop." NLRB vs. General Motors Corp., 373 U.S. 734, 83 S.Ct. 1453 (1963).

Prior to the expiration of the collective bargaining agreement in question, on June 30, 1983, Peterson

Painting Co. was a closed or union shop. The Board's orders restoring the employer, employees and union to June 30, 1983, would have the effect of subjecting the current employees to the restrictions of a closed shop without having had an opportunity to have participated at all in any of the processes. Such employees are now met by the single and rather final choice of either joining the closed shop employer or ending their employment. As union members, they would be required to pay, among other things, initiation fees and dues. Hence, their choice is between being compelled to union membership with its attendant payment of fees and dues or to employment termination. No matter which way these current employees go, their property rights will be

adversely affected without having been offered not even the most rudimentary requirements of due process of law guaranteed to them under the Fifth and Fourteenth Amendments to the U. S. Constitution.

Moreover, inasmuch as the closed shop is being imposed upon them as a "fait accompli" or by judicial fiat, they are thrust in a position that is quite different from the "old employees" and from those employees who elect to seek or not to seek employment with a closed shop employer. The old employees had the opportunity to participate and to vote on union and collective bargaining matters affecting them; a prospective new employee has the opportunity, either at or prior to accepting employment or within

7 days thereafter, to elect whether he or she wishes to become an employee of a closed shop employer. The current employees of Peterson Painting have none of these choices available to them. Their only choice is to join and contribute money to the union or to suffer the pain of termination of employment. That "choice" contravenes both the statutory objectives of the Act and the Constitution inasmuch as it impels invidious discrimination against the current employees without any rational basis therefor, in violation of the Fifth and Fourteenth Amendments to the U. S. Constitution.

Hence, to the extent that the orders are made applicable to current employees, they are void as violative of one or more of the

objectives of the Act, H. K. Porter Co. vs. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970), and they are violative of the constitutional rights of the employees.

B. Violation of Fundamental Rights to Agree.

"The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the party's freedom of contract is not absolute under the Act...allowing the Board to compel agreement when the parties are unable to agree would violate the fundamental premise upon which the Act is based--private bargaining under governmental supervision of the procedure alone, without any

official compulsion over the actual terms of the contract." H. K. Porter Co. vs. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970). Such freedom of contract is no less applicable to the employee's own right to contract advantageously with a nonunion employer and to have such a contract be free from abridgment by retroactive orders of the Board.

In the Brief for the National Labor Relations Board in Support of Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board filed with the United States Court of Appeals, at pages 7 and 8, counsel for the Board acknowledges that the wages paid by petitioner to some of the current employees were greater than those

petitioner would have been required to pay under the collective bargaining agreement that the Painting and Decorating Contractors Association made with the union after Peterson's withdrawal from this association. It is clear, therefore, that at least some of the current employees will be adversely affected in that at least some of them would receive lesser pay for the same work and would, further, have to pay union fees and dues which would further reduce their compensation.

All of the foregoing would be happening to the current employees without, so far, their having had any opportunity to be heard at <u>any level</u>--administrative, judicial or otherwise.

It can hardly be argued that the interests of the union and of the current employees are consistent. They are patently not. The once widely held belief that the interests of the union were synonymous with those of the employees it represented has been shed. Steele vs. Louisville and Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226.

In this case, the union, the employer and the Board have all endeavored "to do right"; unquestionably, in extending the orders made herein to the current employees, the Board thought to be acting for their benefit. As it turns out, the Board has unwittingly denied such employees valuable rights under the Act, as well as under the U. S. Constitution. For

all such reasons, the orders, as applied to them, ought to be set aside as being both in excess of the Board's remedial authority and as being unconstitutional.

IV. THE ORDERS OF THE BOARD EXCEED ITS REMEDIAL AUTHORITY TO THE EXTENT THAT THEY HAVE PENAL OR CONFISCATORY EFFECTS.

The so-called "make-whole" orders made in this case require payment of back pay and of other benefits and payments into the union benefits funds. Again, such orders are extended to all, that is, to the old as well as to the current employees.

In making the orders restoring the union and the employer to their respective positions on June 30, 1983, the last day of the expiring collective bargaining agreement, the Board has created a fiction that clashes severely

with the reality of the circumstances prevailing.

Counsel for the Board seems to acknowledge that the orders do not really subject the parties and the current employees to the agreement itself; counsel advances the position that only the terms and conditions of the collective bargaining agreement expiring on June 30, 1983 are applicable.(Opposition of the National Labor Relations Board to the Company's Motion for a Stay of Mandate, pages 4 and 5). Assuming, arguendo, that such is the case, the orders patently raise the specter of two other impermissible infirmities, that is, those of: (a) unjust enrichment or windfall to the union and to the members of such union totally unrelated to petitioner and to its current employees and (b) penal damages to the employer.

Payment of back pay inures to the direct benefit of the employees; hence, it does not have the same effect as the benefits payments required to be made by petitioner to the union benefit funds. While the latter payments will serve to build up union funds, it is apparent that none of the current employees may receive any of the benefits from those funds.

Current employees are not now nor have they been members of such a union since the beginning of their employment with petitioner. While negotiations between petitioner and the union could lead to a collective bargaining agreement, such negotiations could also lead to an impasse. In either event, current employees might never become members of the union and become thereby entitled to some of the benefits for which petitioner is being made to pay <u>now</u>. If a collective bargaining

agreement is reached, it is possible that some current employees could elect to end employment rather than to join a union closed shop. If a collective bargaining agreement is not reached in good faith negotiations ultimately leading to impasse, petitioner will become free of the last vestiges of the last collective bargaining agreement that expired on June 30, 1983; in such an event, none of the current employees will likely become members of the union.

The record is devoid of any evidence that allows nonunion members to receive benefits under the union's trust funds. Indeed, if it did, there would be suits by union members for illegal dissipation of their funds inasmuch as 29 USCA §186, which governs restrictions on financial transactions, requires that money paid to a trust fund be for "the sole and

exclusive benefit of the employees...and their families." (29 USCA §186(c)).

Clearly, therefore, to the extent that contributions being required to be made to the benefits funds do not and may not ever inure to the benefit of current employees, they are penal and imposed "to achieve ends other than those which can thoroughly be said to effectuate the policies of the Act." Virginia Electric and Power Co. vs. NLRB, 319 U.S. 533, 540, 12 LRRM 739, 743.

As such, they are void since the power to command affirmative action is remedial and not punitive, and the Board, therefore, is not free to set up any system of penalties that it deems appropriate in derogation of or without regard to the objectives of the Act. Republic Steel Corp. vs. NLRB, 311 U.S. 7, 9-11, 7 LRRM 287, 289 (1940).

Hence, counsel for the Board, having conceded that the petitioner's current employees are <u>not</u> union members and there being nothing in the evidentiary record to show the flow of any benefits from the union benefits trust funds to petitioner's current employees, whether extended <u>retroactively</u> or <u>otherwise</u>, any payments made by petitioner to said funds for the current employees constitute an impermissible penalty that must be set aside as void.

CONCLUSION

In that the "make-whole" orders, particularly with respect to the mandate to pay, retroactively, to the union benefits funds and as extended to the current employees of petitioner, are void for being (a) in excess of the remedial authority granted by Congress to the Board by Section 10(c); (b) in violation

of one or more of the stated objectives of the Act; (c) in violation of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments; (d) in violation of the constitutional principle of separation of powers; and (e) in further violation of the Act in imposing penal and confiscatory assessments against petitioner, it is respectfully requested that the herein Petition for Writ of Certiorari be granted.

Respectfully submitted,

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March 17, 1987

86 1543 2

Supreme Court, U.S.
FILED
MAR 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.
Petitioner/Cross-Respondent
vs.
NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
MEMORANDUM*

Petition for Review of National Labor Relations Board
(Argued and Submitted November 12, 1986 - San Francisco)

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

Peterson Painting, Inc. appeals a National Labor Relations Board order requiring it to reinstate certain employee benefit plans, bargain with the union and make employees whole. The Board cross-appeals for enforcement of its order. The Board found that Peterson withdrew recognition from the union, unilaterally changed terms and conditions of employment, and constructively discharged six employees, all in violation of the National Labor Relations Act (the Act), 29 U.S.C. Sec. 158(a)(1), (3) and (5). Peterson contends that the Board's order is punitive, inequitable and beyond its remedial scope.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Peterson is a residential painting contractor. From 1971 to 1983, it was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multiemployer bargaining group. Peterson's painting employees were represented by District Council of Painters No. 33 and were covered by the collective bargaining agreements between District 33 and the PDCA.

On December 8, 1982, Peterson timely withdrew from the PDCA. It also advised District 33 that it would terminate the PDCA contract when it expired on June 30, 1983.

On February 2, 1983, District 33 requested Peterson to begin negotiations for a successor collective bargaining agreement. Peterson did not respond. On June 8, 1983, District 33 again asked Peterson to commence contract negotiations and Peterson did not respond. On June 29, 1983, District 33 telephoned Peterson inquiring about contract negotiations. Peterson replied that it had not yet decided whether it would sign a successor contract. District 33 called about negotiations the next day and received a similar response. Peterson and District 33 have never bargained for a successor contract.

When the PDCA contract expired, Peterson withdrew recognition from the union and stopped paying wages and benefits required under that contract. Peterson told its employees that it had gone non-union and would not complete its union projects. Its six painting employees left the company as they wished to work on union jobs. Peterson assisted these employees in finding union jobs.

Peterson hired new employees for its non-union work. It negotiated new wage and benefit packages individually with each new employee.

The Board found that Peterson's withdrawal of recognition and unilateral changes were unfair labor practices under the Act. It ordered Peterson to reinstate the terms of the PDCA contract and to bargain with the union for a replacement labor contract. It ordered that the affected employees, including both the discharged and newly hired employees, be made whole for any loss caused by Peterson's unlawful conduct.

It is well settled that if an employer unilaterally changes terms and conditions of employment following a contract's expiration, it violates the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981). It is equally well settled that an employer may not withdraw recognition from a union or deal directly with its employees absent objective evidence that the

union has lost majority support. *Pioneer Inn Association v. NLRB*, 578 F.2d 835 (9th Cir. 1978) (withdrawal of recognition); *NLRB v. Tom Johnson, Inc.*, 378 F.2d 342 (9th Cir. 1967) (direct dealing). Similarly, an employer may not condition continued employment on forsaking union membership. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The Board's unfair labor practice findings are based on these principles and are affirmed.

Peterson does not deny that it acted unlawfully. Instead, it argues that the Board exceeded its authority by entering a punitive order. In particular, it contends that reinstating the provisions of the PDCA contract and applying them to employees hired after June 30, 1983 is penal, not remedial. Peterson relies principally on *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d Cir. 1979) to support its contention.

The Board's remedial authority is found in 29 U.S.C. Sec. 160(c). Under that section, the Board shall order a violator "to cease and desist from such unfair labor practices and to take such affirmative action . . . as will effectuate the purposes of [the Act]." *Id.* The Board's discretion to formulate an appropriate remedy is exceedingly broad and will not be disturbed on review absent a clear abuse of discretion. *General Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986). Courts should not substitute their judgment for the Board's in determining how to undo the effects of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 888 (1984). "[U]nless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's order will be enforced. *Virginia Power & Electric Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, *Seattle Auto Glass v. NLRB*, 669 F.2d 1332 (9th Cir. 1982), and backpay to newly hired replacement employees, *Crest Floor & Plastics, Inc. v. NLRB*, 274 NLRB No. 185, *enf'd mem.* 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion.

Peterson's reliance on *Carpenter Sprinkler* is misplaced. In that case, the employer unilaterally changed wages and benefits only after substantial bargaining, a strike had occurred and it,

in good faith, believed that a bargaining impasse had been reached. The court concluded that, given these three factors, requiring the employer to reinstate the former terms of employment was an undue hardship and was penal, not remedial. *Carpenter Sprinkler*, 605 F.2d at 66-69.

None of these factors is present in this case. Peterson never bargained with the union. It ignored the union's repeated requests to commence negotiations. It could not reasonably believe that a bargaining impasse had been reached. No strike occurred. Peterson unilaterally withdrew recognition from the union in clear violation of its employee's statutory rights. In short, Peterson approached brazen disregard for its employee's statutory rights.

The Board's order will be enforced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
ORDER

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

The Memoramdum disposition filed November 14, 1986 should be corrected as follows: *Page 1, line 11*, the words "Argued and" should be deleted. A corrected copy is attached.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
AMENDED MEMORANDUM*

Petition for Review of National Labor Relations Board
(Submitted** November 12, 1986 - San Francisco)
DECIDED NOVEMBER 14, 1986

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

Peterson Painting, Inc. appeals a National Labor Relations Board order requiring it to reinstate certain employee benefit plans, bargain with the union and make employees whole. The Board cross-appeals for enforcement of its order. The Board found that Peterson withdrew recognition from the union, unilaterally changed terms and conditions of employment, and constructively discharged six employees, all in violation of the National Labor Relations Act (the Act), 29 U.S.C. Sec. 158(a)(1), (3) and (5). Peterson contends that the Board's order is punitive, inequitable and beyond its remedial scope.

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** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 3(f).

Peterson is a residential painting contractor. From 1971 to 1983, it was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multi-employer bargaining group. Peterson's painting employees were represented by District Council of Painters No. 33 and were covered by the collective bargaining agreements between District 33 and the PDCA.

On December 8, 1982, Peterson timely withdrew from the PDCA. It also advised District 33 that it would terminate the PDCA contract when it expired on June 30, 1983.

On February 2, 1983, District 33 requested Peterson to begin negotiations for a successor collective bargaining agreement. Peterson did not respond. On June 8, 1983, District 33 again asked Peterson to commence contract negotiations and Peterson did not respond. On June 29, 1983, District 33 telephoned Peterson inquiring about contract negotiations. Peterson replied that it had not yet decided whether it would sign a successor contract. District 33 called about negotiations the next day and received a similar response. Peterson and District 33 have never bargained for a successor contract.

When the PDCA contract expired, Peterson withdrew recognition from the union and stopped paying wages and benefits required under that contract. Peterson told its employees that it had gone non-union and would not complete its union projects. Its six painting employees left the company as they wished to work on union jobs. Peterson assisted these employees in finding union jobs.

Peterson hired new employees for its non-union work. It negotiated new wage and benefit packages individually with each new employee.

The Board found that Peterson's withdrawal of recognition and unilateral changes were unfair labor practices under the Act. It ordered Peterson to reinstate the terms of the PDCA contract and to bargain with the union for a replacement labor contract. It ordered that the affected employees, including both the discharged and newly hired employees, be made whole for any loss caused by Peterson's unlawful conduct.

It is well settled that if an employer unilaterally changes terms and conditions of employment following a contract's expiration, it violates the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Carilli*, 648 F.2d 1206 (9th Cir. 1981). It is equally well settled that an employer may not withdraw recognition from a union or deal directly with its employees absent objective evidence that the

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Peterson does not deny that it acted unlawfully. Instead, it argues that the Board exceeded its authority by entering a punitive order. In particular, it contends that reinstating the provisions of the PDCA contract and applying them to employees hired after June 30, 1983 is penal, not remedial. Peterson relies principally on *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d Cir. 1979) to support its contention.

The Board's remedial authority is found in 29 U.S.C. Sec. 160(c). Under that section, the Board shall order a violator "to cease and desist from such unfair labor practices and to take such affirmative action . . . as will effectuate the purposes of [the Act]." *Id.* The Board's discretion to formulate an appropriate remedy is exceedingly broad and will not be disturbed on review absent a clear abuse of discretion. *General Teamsters Local 162 v. NLRB*, 782 F.2d 839 (9th Cir. 1986). Courts should not substitute their judgment for the Board's in determining how to undo the effects of unfair labor practices. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 888 (1984). "[U]nless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the Board's order will be enforced. *Virginia Power & Electric Co. v. NLRB*, 319 U.S. 533, 540 (1943).

The Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, *Seattle Auto Glass v. NLRB*, 669 F.2d 1332 (9th Cir. 1982), and backpay to newly hired replacement employees, *Crest Floor & Plastics, Inc. v. NLRB*, 274 NLRB No. 185, *enf'd mem.* 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion.

Peterson's reliance on *Carpenter Sprinkler* is misplaced. In that case, the employer unilaterally changed wages and benefits only after substantial bargaining, a strike had occurred and it,

in good faith, believed that a bargaining impasse had been reached. The court concluded that, given these three factors, requiring the employer to reinstate the former terms of employment was an undue hardship and was penal, not remedial. *Carpenter Sprinkler*, 605 F.2d at 66-69.

None of these factors is present in this case. Peterson never bargained with the union. It ignored the union's repeated requests to commence negotiations. It could not reasonably believe that a bargaining impasse had been reached. No strike occurred. Peterson unilaterally withdrew recognition from the union in clear violation of its employee's statutory rights. In short, Peterson approached brazen disregard for its employee's statutory rights.

The Board's order will be enforced.

277 NLRB No. 103

DeJB
D--3323
San Jose, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADE PAINTING COMPANY, INC. Case 32--CA--5842

PETERSON PAINTING, INC. Case 32--CA--5843

JOHN COSTA,
A SOLE PROPRIETORSHIP, Case 32--CA--5866
d/b/a JOHN COSTA PAINTING COMPANY

and

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

DECISION AND ORDER

On 6 December 1984 Administrative Law Judge James S. Jenson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1], and conclusions[2], and to adopt the

[1] The respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that neither Respondent Peterson nor Respondent Cascade rebutted the presumption of the Union's continuing majority status, we find it necessary to rely on the principle enunciated in *Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976), that new employees support the union in the same ratio as those whom they have replaced.

recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that Respondent Cascade Painting Company, Inc., San Jose, California, and Respondent Peterson Painting, Inc., San Jose, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph B, 1, b and reletter the subsequent paragraphs.

"b. Informing unit employees that it would become a nonunion employer."

Dated, Washington, D.C. 29 November 1985

Patricia Diaz Dennis Member

Wilford W. Johansen Member

Marshall B. Babson Member

NATIONAL LABOR RELATIONS BOARD
(SEAL)

[3] The judge found that Respondent Peterson violated Sec. 8(a)(1) by informing employees it would become a nonunion employer, but the judge inadvertently omitted this finding from the Order. We correct this omission.

In "The Remedy" section of his decision, the judge recommended that Respondents be ordered to reimburse the Union for benefit funds provided for in the collective-bargaining agreement. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondents must pay any additional amounts into the fringe benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CASCADE PAINTING COMPANY, INC.

and Case 32--CA--5842

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

PETERSON PAINTING, INC.

and Case 32--CA--5843

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

JOHN COSTA, A SOLE PROPRIETOR8HIP,
d/b/a JOHN COSTA PAINTING COMPANY

and Case 32--CA--5866

DISTRICT COUNCIL OF PAINTERS NO. 33,
INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED WORKERS

Linda-Bytof and William O'Connor, of Oakland, CA, for the General Counsel.

La Croix, Schumb, Mateucci & Keller, by Edward R. La Croix, SR., of San Jose, CA, for Cascade Painting Company, Inc., and Peterson Painting, Inc.

John Costa, for John Costa, A Sole Proprietorship, d/b/a John Costa Painting Company.

Wylie Blunt, McBride and Jesinger, by Robert Jesinger, of San Jose, CA, for the Charging Union.

DECISION

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: These cases were heard in Campbell, California, on May 23, 24 and 25, 1984 pursuant to charges filed by District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, herein District Council or Union, and an order consolidating all three cases for hearing dated May 10, 1984. The complaints involving Respondents Cascade and Peterson were amended both prior to and at the hearing.[1] The complaints as amended in Cases 32--CA--5842 and 5843 allege in substance that Respondents Peterson and Cascade each unlawfully refused to bargain with, and withdrew recognition from, the District Council after their collective-bargaining agreements expired on June 30, 1983; that each Respondent made unilateral changes in wages and terms and conditions of employment of unit employees; that each Respondent dealt directly with its respective employees concerning wages, benefits and other terms and conditions of employment, all in violation of Section 8(a)(5); and that each Respondent constructively discharged its employees by forcing them to quit their employment rather than continue without union representation, in violation of Section 8(a)(3). Respondent Peterson is also alleged to have unlawfully informed employees that it would become nonunion, in violation of Section 8(a)(1). While admitting a number of the complaint allegations, both Respondents deny the commission of any unfair labor practices.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. A brief was filed by the General Counsel and has been carefully considered.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:[2]

[1] After the hearing opened, the General Counsel moved to sever Case 32--CA--5866 from the other two cases and to dismiss the complaint in that case upon the basis of a settlement agreement between the parties involved therein. The motion was granted.

[2] The General Counsel's unopposed Motion to Correct Transcript of Hearing is granted and is made a part of the record as General Counsel's Exhibit No. 24.

Findings of Fact

I. Jurisdiction

It is alleged, admitted and found that each of the Respondents has an office and place of business in San Jose, California where it is engaged in the painting of commercial and residential buildings; that during the paat 12 months each Respondent sold goods or provided services valued in excess of $50,000 to customers or business enterprises in California, which customers or business enterprises themselves met one of the Board's jurisdictional standards other than the indirect inflow or indirect outflow standards; and that at all times material herein each of the Respondents has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

It is alleged, admitted and found that District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Setting

Respondent Cascade and Respondent Peterson are each engaged in the painting business in San Jose, California. Jack Cook is Respondent Cascade's president,[3] and Victor Peterson and Raymond Peterson, his son, are Respondent Peterson's president and vice-president respectively. Each of the companies admits that the named individuals are its respective supervisors and agents within the meaning of Section 2(11) and (13) of the Act. For a number of years both Respondents were employer-members of the Painting and Decorating Contractors Association of Central Coast Counties, Inc., herein PDCA, to whom each had given authorization to bargain collectively. By virtue of their membership in PDCA, both Respondents were

[3] Prior to mid-1981, Cascade performed its commercial work through R & T Painting, a wholly owned subsidiary. The two were merged in 1981 and have since operated as Cascade/R & T Painting Inc., herein called Cascade.

parties to a series of successive collective-bargaining agreements with the Union, the most recent being effective from July 1, 1980 through June 30, 1983. Traditionally negotiations for successor agreements have commenced in January of the contract expiration year. Due to economic conditions, however, in late 1982, the Union offered to reopen the 1980-1983 contract and commence negotiations on a successor agreement early. Upon agreement by the PDCA, negotiations commenced in December 1982 with Cook serving as chairman of the PDCA negotiation committee. Victor Peterson was also on the PDCA negotiating committee.[4] Ken Lorentzen, the Union's executive secretary, was the Union's chief negotiator. Because several employers had indicated an intent to withdraw from the PDCA and thus not be bound by the negotiations, the question arose as to when withdrawals would be effective. The Union took the position that in order to be effective, withdrawals would have to be submitted before agreement on a successor contract was reached. Accordingly, approximately 30 PDCA members notified the Union of their withdrawal from the PDCA. Cascade's letter withdrawing bargaining authority from the PDCA is dated November 19, 1982, and Peterson's is dated Deoember 8, 1982. No contention is made that the notices were not timely. An agreement amending the 1980-1983 agreement was reached on an unspecified date in December 1982 and was signed on behalf of the Union on January 4, 1983 ,and by the PDCA on January 11, 1983. The new agreement titled "Amendments to the Peninsula Area Painters & Decorators Agreement 1/1/83-6/30/87" incorporated the 1980-1983 agreement with certain notifications, among which was an agreement by the Union to forego a Cost of Living Adjustment of 65 cents which was due on January 1, 1983 under the 1980- 1983 contract, and an agreement to cut the wage rate of residential painters approximately $4 per hour on July 1, 1983. Those employers that gave notice of their withdrawal from the PDCA were still subject to the terms of the 1980-1983 agreement until it expired on June 30, 1983, including the 65 cents COLA due January 1, 1983, which both Respondents paid.

The complaints in 32--CA--5842 and 32--CA--5843 allege, and the record establishes, that at all material times prior to July 1, 1983, the following employees of the PDCA members constituted a stable unit appropriate for collective bargaining purposes:

[4] Both Cook and Peterson had held various positions in PDCA and participated in earlier contract negotiations with the Union.

All painters, decorators, paperhangers, building workers and sandblaster employees employed within San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

It is further alleged, admitted and proven that since at least 1971 and until July 1, 1983, the Union was recognized as the designated exclusive representative of said employees. The complaint in 32--CA--5842 further alleges that since January 13, 1983, a unit limited to Cascade's employees which encompassed the job classifications and territorial scope of the multiemployer unit, constituted a stable appropriate unit. The complaint in 32- CA--5843 alleges that since January 24, 1983, a unit limited to Peterson's employees also constituted a stable appropriate unit. The respective complaints alleged that since those dates the Union has been the designated representative of the employees in the respective single employer units; and that from February 3, 1983 until sometime in June 1983 Cascade and Peterson recognized and bargained with the Union concerning a successor agreement to cover their respective employees. It is further alleged that on or about June 30, 1983, Cascade and Peterson each constructively discharged their respective painters and on July 1 discontinued and changed terms and conditions of employment without prior notice to the Union, and since said date have refused to recognize and bargain with the Union. It is also alleged that after July 1, 1983, both Respondents dealt directly with employees regarding wages and conditions of employment.

B. Cascade and Peterson Become Nonunion Employers

As previously noted, on November 19, 1982, Cook notified the Union by letter that Cascade was withdrawing bargaining authorization from the PDCA and would no longer be bound by the 1980-1983 contract as of July 1, 1983. This message was reiterated in an identically worded letter dated January 13, 1983. Cook testified that he decided to withdraw from the PDCA "because of the attitude of labor" and that he didn't want to deal with Lorentzen because of a personality conflict. Alex Muirhead,[5] Cascade's superintendent, testified that sometime in the

[5] Muirhead was alleged initially as one of the discriminatees in Case 32--CA--5842. When it became clear on the record that he was a supervisor, the General Counsel amended paragraph 6 of the complaint in that case to delete his name.

latter part of 1982, Cook told him that he was "thinking about going non-union, not signing the agreement," and asked if Muirhead would stay with him under those circumstances. Muirhead, a long time union member, responded in the negative.[6] In early 1983, Cook also held informal employee meetings wherein he discussed the possibility of Cascade becoming a nonunion employer and questioned whether the employees would work without a union contract. He also stated that if he didn't sign a union contract, he would supply equal benefits. The evidence further shows that in a meeting with union representatives Downey and Ruybaled on June 22, 1983, Cook stated that he hadn't decided whether he "was going to stay in the Union or not," and that he had told his employees that Cascade was going nonunion, and that they could select what they wanted to do. Cook admitted having told Downey and Ruybaled that he wanted to try and operate on a nonunion basis because he didn't feel he could negotiate in a positive manner at that time; that he had a personality conflict with Lorentzen, and "as long as he [Lorentzen] was head honcho, he [Cook] wasn't going to negotiate with" the Union. It is further clear from the record that all five of Cascade's statutory employees -- Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leonard Ruiz -- all members of the Union, left Cascade's employ because Cook had decided that Cascade would operate as a nonunion employer commencing July 1, 1983. It is further clear that when the 1980-1983 contract expired, and without first notifying the Union, Cook ceased making payments to the Union trust funds, instituted a new medical plan and negotiated individually with new employees over wages.

Also as previously noted, on December 8, 1982, Victor Peterson notified the Union by letter that Peterson was withdrawing bargaining authority from the PDCA and would no longer be bound by the 1980-1983 contract as of July 1, 1983. This message was reiterated in an identically worded letter dated January 24, 1983. Victor Peterson testified that about 70 percent of Peterson's painting was performed for Shappell Industries, a large West Coast home builder; that Shappell was going to set up a dual gate system which would allow both union and nonunion contractors on a jobsite; and that if Shappell did institute the dual gate system, he intended to operate as a nonunion contrac-

[6] Cook set up an interview for him with an official of Fortune Painting, a union employer, in the latter part of May 1983, and Muirhead commenced working for that company the first of July when Cascade's contract with the Union expired.

tor. In early 1983, Victor Peterson held a meeting in his home with several employees at which time he stated he was contemplating going nonunion and if he did so, they could continue working for him if they wanted to; that they would be offered benefits comparable to what the Union gave them, including an IRA account to replace the Union's pension, and that he would treat them fairly. In May and June, Victor Peterson told various of his employees that he was not going to sign a union contract and was definitely going nonunion. When the 1980-1983 contract expired on June 30, Peterson was doing work at Moffett Field. Victor Peterson testified that the job superintendent on the Moffett Field job told him that he, Peterson, couldn't finish the job and to get a union contractor to complete it. Accordingly, Peterson made arrangements with Tom Massey, a union contractor, to complete it with Peterson's former employees, all of whom obtained referrals from the Union. It is clear from the record that all six of Peterson's statutory employees -- Joe Champlin, Bill Rose, Natividad Castilleja, Gabe Losada, Alfred Silva and Armando Silva -- all members of the Union, left Peterson's employ because Victor Peterson had decided that Peterson would operate as a nonunion employer commencing July 1, 1983. It is further clear that Peterson stopped making payments to the Union trust funds and stopped complying with any of its terms and conditions when the 1980-1983 contract expired. After that, he negotiated individually with new employees and former employees that were rehired.

Neither Cascade nor Peterson notified the Union of the proposed changes in wages and other terms and conditions of employment that were instituted on and after July 1, 1983, and neither notified the Federal Mediation and Concilliation Service nor the appropriate State agency that it was terminating the contract.

C. The Appropriate Bargaining Units

Both Cascade and Peterson admit the multi-employer unit is appropriate and that the Union represented a majority of the employees in the multi-employer unit. The law is clear that upon Cascade's and Peterson's withdrawal from that unit, there was a rebuttable presumption that the Union continued to represent a majority of their respective employees in single employer units.[7]

[7] The record established, and it was not denied, that both Respondents employed a stable work force

To withdraw recognition lawfully, either this presumption must be overcome by competent evidence that the Union in fact did not represent a majority at the time of the withdrawal, or the employer must establish on the basis of objective facts that it had a reasonable doubt as to the Union's continuing majority status. Both Casoade and Peterson failed tc offer any objective considerations that it had a reasonable doubt as to the Union's continuing majority status, and the record affirmatively shows that the Union in fact represented all their unit employees through June 30, 1983. Further, the Board has ruled, with court approval, that new employees will support the Union in the same ratio as those whom they have replaced. *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center*, 224 NLRB I618 (1976). Accordingly, it is found that at all times material herein, the Union has represented a majority of both Cascade's and Peterson's employees in separate stable and appropriate units.

D. The Union Requests Bargaining

By letters dated February 3, 1983, the Union wrote identically worded letters informing both Respondents that since they had chosen not to be bound by the new PDCA-Union agreement, each was bound by the 1980-1983 agreement until June 30, 1983, including payment of the January 1, 1983 COLA. Both letters state "Please be advised that this Council is prepared to enter into negotiations with your firm, for the purpose of negotiating a new contract." Neither employer responded to the letter.

1. Cascade

On June 8, 1983, Lorentzen sent Cascade another letter asking that it notify the Union of a time and place to begin negotiations. Not having received a response, on June 20 Fermin Ruybaled, a union business representative, called Cook and arranged a meeting for June 22. Ruybaled and Jerry Downey, another business representative, met with Cook on that date. Askeo what he wanted in a contract, Cook responded that he wasn't sure and needed time to think about it but that he might be interested in a repaint agreement which is an addendum to the master contract. Cook stated that while the PDCA contract was a pretty good one, the wages and benefits were too high and he didn't like the restrictions on the "free flow" of men who

worked outside the Union's territorial jurisdiction.[8] He acknowledged having told his employees that "I hadn't decided whether I was going to stay in the Union or not." He also told the union representatives he had told employees the wages he intended to pay after the 1980-1983 contract expired, and would do his best to get them a decent health and welfare program. The meeting ended with Ruybaled stating he would contact Cook soon. The following day Ruybaled called Cook and asked if he had made up his mind about signing an agreement. Cook again stated he needed more time. Ruybaled called him again on July 5 and was told the same thing, that he needed more time and asked for 3 days. Ruybaled called him again on July 11 and was told that Cook had "been too busy, he hadn't thought about it and that . . . he would call us back." The charge was filed by the Union on September 2. On September 7, Cook called Ruybaled concerning the charge. On September 9, Ruybaled went to Cascade's shop to see if Cascade was employing any union members. Cook and Ruybaled had a short conversation wherein Cook expressed his feelings about Lorentzen and that he wasn't going to let the Union dictate what he could do. On September 8, Cook wrote the Board agent assigned to investigate the charge, with a copy to the Union, denying he had refused to bargain and offering to meet with the Union. On September 13, Lorentzen wrote Cook, asking that he "contact this office to establish a time and place agreeable to both parties." He also called Cook and a meeting was set up for September 28. Downey and Ruybaled accompanied Lorentzen. Cook presented the Union the following handwritten proposal:

Proposal to District Council #33

1. Establish new asscciation of employers.

a. Independent Painting Contractors Association of Santa Clara Valley.

2. Repaint agreement open to all repaint.

[8] The contract between the Union and PDCA contains a provision that when an employer performs work outside the territorial jurisdiction of District Council No. 33, he must hire 75 percent of his employees for that project from local union hiring halls. Contracts between neighboring District Councils contain similar provisions. Cook objected to any restrictions on the use of his employees outside the Union's jurisdiction.

3. Change in number of men -- out of area (Repaint) First five from shop.

4. New work -- Ceilings & closets -- spray -- All exterior spray.

5. Option to have our own pension and medical plan.

6. Member of Association (Same as Business agent) Paid by Assoc. for new Assoc.

Cook told the union representatives he was interested in forming a nonunion association, that he wanted an agreement covering the entire Bay Area.[9] Lorentzen advised Cook that while he could not negotiate for the other District Councils, he would check with them regarding the possibility of a "free flow" agreement. There was a further conversation between Cook and Lorentzen in March 1984 when Lorentzen stated he would contact the other District Councils about "free flow" of employees. In May, Lorentzen informed Cook by telephone that he would not prevent Cascade from working in other areas if he signed a contract.

2. Peterson

On June 8, 1983, Lorentzen sent Peterson another letter asking that it notify the Union of a time and place to begin negotiations. Victor Peterson did not respond. He acknowledged several conversations with Downey and Ruybaled wherein they asked his intentions with respect to signing or negotiating a contract and that he responded he didn't know what he was going to do until Shappell decided whether or not it was going to the "dual gate" system but that he was possibly going nonunion. On June 30, he informed Downey that he was going nonunion because Shappell wanted it that way, "and that he would be sending some of the men into the hall that wouldn't be working for him." In early September, Victor and Raymond Peterson met with Lorentzen and Pat Lane, another Union official. Lane asked what it would take for Peterson to sign a contract and was told that if John Moore of Shappell Industries told him to sign, that he would; that Shappell had told him he had to go nonunion. Raymond stated that the big problem was with

[9] In addition to District Council No. 33, the Bay Area encompasses District Council Nos. 8 (from San Francisco north) and 16 (the East Bay through Sacramento).

the builders who were taking nonunion bids. Asked if he felt he was negotiating, Victor Peterson responded in the negative and that he was prepared to negotiate "when I see some daylight at the end of the tunnel."

Discussion

The Act gives employees the right to bargain collectively through representatives of their own choosing. It also requires employers to recognize and bargain with a union where a majority of employees in an appropriate unit have designated or selected that union to do so. Here it was admitted that the District Council represented a majority of both of the Respondents' employees in a multi-employer unit through June 30, 1983, and as discussed earlier, neither Respondent offered any evidence to rebut the presumption that the District Council continued to represent a majority of each of the Respondents' employees in single employer units following withdrawal from multi-employer bargaining. Indeed, the record shows that all of the constructively discharged employees of both Respondents continued to be union members even after the 1980-1983 contraot expired on June 30, 1983. There is no question that the Union was, at all times material, the lawfully designated representative of the employees of both Respondents in appropriate units. Nor is there any question that both of the Respondents simply wanted no part of the Union and informed their respective employees that they were intending to become nonunion employers. This, however, was a choice open only to the employees, not to the employers. Both Respondents, however, made it clear that they would no longer operate with a union or bargain meaningfully with their employees through their duly designated collective bargaining representative. As soon as the 1980-1983 contract expired, and without advising the Union or the federal and state mediation services, both of the Respondents ceased making all payments to the Union trust funds and stopped paying wages in accordance with the contract. Both Respondents negotiated individually with employees regarding wages and other terms and conditions of employment. Their resolve to remain nonunion employers after the expiration of the 1980-1983 contract was made clear through their unilateral action, direct dealing with employees and a failure to engage in any meaningful bargaining with the Union. By embarking on such a courae of action, the Respondents evidenced a withdrawal of recognition

without ever putting in into words.

Section 8(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees," precludes an employer from unilaterally changing terms and conditions of employment that constitute mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964). It is well settled that the terms of a collective-bargaining agreement define the status quo with respect to working conditions, and that an employer is required to maintain that status quo upon expiration of the agreement until the parties reach a new agreement or bargain to impasse. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Neither of those conditions is present here. It is further well settled that pension, health and welfare plans provided for by contract constitute terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining. *Buck Brown Contracting Co., Inc., et al.*, 272 NLRB No. 145 (1984); *Auto Fast Freight, Inc.*, 272 NLRB No. 88 (1984); *NLRB v. Cauthorne*, 691 F.2d at 1024-1025; *Harold W. Hinson d/b/a Henhouse Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Each of the Respondents was duty bound to continue recognizing and dealing with the Union as the bargaining agent of its unit employees while at the same time continuing in effect all terms and conditions of employment encompassed in its expired contract with the Union until it had negotiated a renewal agreement or bargained to a true impasse.

As the record evidence shows, each of the employees employed by each of the Respondents quit their jobs because their employers had announced they were going to operate thereafter as nonunion employers, and they did not want to lose the benefits they had accrued through the Union. By declaring that they were going nonunion, each of the Respondents forced its employees to either quit or forego further representation by their duly designated collective bargaining representative. A choice of this character may not validly be imposed upon employees and violates the Act. *Superior-Sprinkler Inc.*, 227 NLRB 204 (1976). Accordingly, it is found, as alleged that: (a) Cascade constructively discharged Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz; and (b) Peterson constructively disoharged Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva, both Respondents

thereby violating Section 8(a)(1) and (3) of the Act.

IV. The Remedy

Having found that each of the Respondents has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5), (3) and (1) of the Act, it will be recommended that they each be required to cease and desist therefrom, and, upon request, bargain collectively with the Union as the collective bargaining representative of all employees in their respective appropriate single employer units, and if an understanding is reached by the respective Respondents, embody such understanding in a signed agreement.

Having found that each of the Respondents has unilaterally and discriminatorily changed terms and conditions of employment following the expiration of the 1980-1983 collective-bargaining agreement with the Union, including the cessation of payments of contractually mandated contributions for certain fringe benefits as set forth in said agreement, in derogation of its ongoing obligation to bargain with the Union about any such changes, in violation of Section 8(a)(5), (3) and (1) of the Act, and having found that Cascade unlawfully terminated Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz, and that Peterson unlawfully terminated Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva, in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that each of the Respondents cease and desist therefrom and offer its respective employees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudioe to their seniority or other rights and privileges. It is recommended that each of the Respondents rescind all unilateral changes instituted on and after July 1, 1983, reinstitute the terms and conditions of the 1980-1983 agreement, and make whole all unit employees, including those listed above and employees hired after June 30, 1983, for any loss of wages or other benefits suffered as a result of the unlawful discharges and unilateral changes, including payment into the benefit funds provided for in the expired contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal conduct, until such time as the respective Respondents negotiate in good faith with

the Union to a new agreement or to an impasse.[10] Backpay is to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis-Plumbing-Co.*, 138 NLRB 716 (1962).

Upon the basis of the above findings of fact and upon the entire record, I make the following:

Conclusions of Law

1. Cascade Painting Company, Inc., and Peterson Painting, Inc., each are employers engaged in commeroe within the meaning of Section 2(2), (6) and (7) of the Act.

2. District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a stable unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material since January 13, 1983, the Union has represented a majority of Respondent Cascade's employees in the above appropriate bargaining unit, and has been the exclusive representative of said employees for the purpose of oollective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from, and by refusing to bargain with the Union since July 1, 1983; by unilaterally discontinuing and changing existing wages and benefits of unit employees; and by dealing directly with unit employees concerning wages and benefits on and after July 1, 1983, Respondent Cascade engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

[10] I do not recommend that the Board order duplicate coverage and benefits for those discriminatees who continued to receive those contractual benefits after June 30, 1983 pursuant to employment by employers who themselves made contributions to said funds on their behalf pursuant to a collective-bargaining agreement with the Union.

6. By constructively discharging Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz on or about June 30, 1983 because of their membership in the Union, Respondent Cascade engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

7. All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act, constitute a stable unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

8. At all times material since January 24, 1983, the Union has represented a majority of Respondent Peterson's employees in the above appropriate bargaining unit, and has been the exclusive representative of said employees for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

9. By informing unit employees in June 1983 that it would become a nonunion employer, Respondent Peterson violated Section 8(a)(1) of the Act.

10. By withdrawing recognition from, and by refusing to bargain with the Union since July 1, 1983; by unilaterally discontinuing and changing existing wages and benefits of unit employees; and by dealing directly with unit employees concerning wages and benefits on and after July 1, 1983, Respondent Peterson engaged in conduct volative of Section 8(a)(5) and (1) of the Act.

11. By constructively discharging Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva on or about June 30, 1983 because of their membership in the Union, Respondent Petersen engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

12. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I

hereby issue the following recommended:[11]

ORDER

A. Respondent Cascade, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Withdrawing recognition and refusing to bargain with the Union on and after July 1, 1983, as the exclusive representative of its employees in the appropriate unit described below; unilaterally discontinuing and changing existing wages and benefits of unit employees; and dealing directly with unit employees concerning wages and benefits on and after July 1, 1983. The appropriate bargaining unit is:

All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

b. Discouraging membership in the Union by constructively discharging employees because of their membership in it.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

a. Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

b. Offer Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or

[11]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conolusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

other rights and privileges, and make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

c. Revoke the unilateral changes instituted on and after July 1, 1983 and reinstitute the terms and conditions of the expired 1980-1983 collective-bargaining agreement with the Union.

d. Pay into the benefits funds provided for in the 1980-1983 contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal unilateral changes.

B. Respondent Peterson, its officers, agents, successors and assigns shall:

1. Cease and desist from:

a. Withdrawing recognition and refusing to bargain with the Union on and after July 1, 1983, as the exclusive representative of its employees in the appropriate unit described below; unilaterally discontinuing and changing existing wages and benefits of unit employees; and dealing directly with unit employees concerning wages and benefits on and after July 1, 1983. The appropriate bargaining unit is:

All painters, decorators, paperhangers, building workers and sandblaster employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

b. Discouraging membership in the Union by constructively discharging employees because of their membership in it.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

a. Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached,

embody such understanding in a signed agreement.

b. Offer Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against each in the manner described above in the section entitled "The Remedy."

c. Revoke the unilateral changes instituted on and after July 1, 1983 and reinstitute the terms and conditions of the expired 1980-1983 collective-bargaining agreement with the Union.

d. Pay into the benefits funds provided for in the 1980-1983 contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal unilateral changes.

C. Each of the Respondents, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

a. In any like or related manner interfering with, restraining; or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following further affirmative action which is necessary to effectuate the policies of the Act:

a. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due employees and the amount of the sums to be paid into the benefit funds provided for in the aforementioned contract.

b. Post at their respective offices copies of the applicable

notice attached hereto and marked Appendix 1 and 2.[12] Copies of said notices, to be furnished by the Regional Director for Region 32, shall, after being duly signed by a representative of the respective Respondents, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all such places where notices to employees in the appropriate unit are customarily posted. Reasonable steps shall be taken by the respective Respondents to insure that said notices are not altered, defaced, or covered by any other material.

c. Notify the Regional Director for Region 32; in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: December 6, 1984

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX 1

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATE GOVERNMENT

WE WILL NOT discourage membership in District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, or any other labor organization, by constructively discharging employees because of their union membership.

WE WILL NOT make or effect any change in the wages, hours, or other terms and conditions of employment of employees in the collective bargaining unit describe below without first giving notice to the above-named Union and affording the Union an opportunity to engage in collective bargaining with respect to any such change.

WE WILL NOT deal directly with our employees regarding wages, benefits, and working conditions in derogation of our duty to bargain with the above Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL revoke the unilateral changes in terms and conditions of employment instituted by us on and after July 1, 1983, and WE WILL reinstitute the terms and conditions of the July 1, 1980 to June 30, 1983 collective-bargaining agreement with the Union.

WE WILL, upon request, bargain collectively with District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, as the exclusive representative of all our employees in the unit described below, and if an agreement is reached, we will embody it in a signed contract. The appropriate unit is:

All painters, decorators, paperhangers, building workers and sandblasters employees employed by Respondent Cascade in San Mateo, Santa Clara, Santa Cruz, San Benito and

Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Ernie Lopez, Ryan McBeth, Don Aure, Raul Allatorre and Leo Ruiz immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and WE WILL make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against them.

WE WILL, in accordance with the terms of the July 1, 1980 to June 30, 1983 collective-bargaining agreement between us and the Union, pay all delinquent contributions to the fringe benefit funds contained therein, and WE WILL continue to pay such contributions until such time as we negotiate in good faith with the Union to a new agreement or to an impasse.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

CASCADE PAINTING COMPANY, INC.

Dated __________ By ____________________________

(Representative) (Title)

APPENDIX 2

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AN AGENCY OF THE UNITED STATE GOVERNMENT

WE WILL NOT discourage membership in District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, or any other labor organization, by constructively discharging employees because of their union membership.

WE WILL NOT make or effect any change in the wages, hours, or other terms and conditions of employment of employees in the collective bargaining unit describe below without first giving notice to the above-named Union and affording the Union an opportunity to engage in collective bargaining with respect to any such change.

WE WILL NOT deal directly with our employees regarding wages, benefits, and working conditions in derogation of our duty to bargain with the above Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL revoke the unilateral changes in terms and conditions of employment instituted by us on and after July 1, 1983, and WE WILL reinstitute the terms and conditions of the July 1, 1980 to June 30, 1983 collective-bargaining agreement with the Union.

WE WILL, upon request, bargain collectively with District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers, as the exclusive representative of all our employees in the unit described below, and if an agreement is reached, we will embody it in a signed contract. The appropriate unit is:

All painters, decorators, paperhangers, building workers and sandblasters employees employed by Respondent Peterson in San Mateo, Santa Clara, Santa Cruz, San Benito and

Monterey Counties, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer to Joe Champlin, Bill Rose, Nate Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each would have been in absent the discrimination against each, or, if such position no longer exists, to a substantially equivalent position without prejudice to their seniority or other rights and privileges, and WE WILL make each of them and all employees employed on and after July 1, 1983, whole for any loss of pay or other benefits suffered by reason of the discrimination against them.

WE WILL, in accordance with the terms of the July 1, 1980 to June 30, 1983 collective-bargaining agreement between us and the Union, pay all delinquent contributions to the fringe benefit funds contained therein, and WE WILL continue to pay such contributions until such time as we negotiate in good faith with the Union to a new agreement or to an impasse.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent provided by Section 8(a)(3) of the Act.

PETERSON PAINTING COMPANY, INC.

Dated ________ By ______________________________

(Representative) (Title)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
PETERSON PAINTING, INC.,
Petitioner/Cross-Respondent,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner,

Nos. 85-7711 & 86-7035
DC# 32-CA-5843
(277 NLRB No. 103)
ORDER

Before: WRIGHT, SNEED and KOZINSKI, Circuit Judges.

The petition for rehearing, filed on November 28, 1986, has heen considered and is DENIED.

(3)

No 86-1543

In the Supreme Court of the United States

OCTOBER TERM, 1986

PETERSON PAINTING, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion by directing an employer who had unlawfully changed the terms and conditions of employment after contract expiration to reinstitute those terms and conditions and apply them to all bargaining unit employees.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1543

PETERSON PAINTING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals enforcing the order of the National Labor Relations Board is reported at 804 F.2d 1253 (Table). The court's unpublished opinion is reprinted in the unnumbered appendix to the petition for certiorari.[1] The decision and order of the National Labor Relations Board (Pet. App. 11a-12a), and the decision of the administrative law judge (Pet. App. 13a-35a), are reported at 277 N.L.R.B. 103.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1986. The order of the court denying a

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[1]For ease of reference, we have assigned numbers to the pages of petitioner's appendix. Thus numbered, the court's opinion appears at Pet. App. 7a-10a.

petition for rehearing was entered on December 17, 1986 (Pet. App. 36a). The petition for a writ of certiorari was filed on March 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a residential painting contractor. From 1971 to 1983, petitioner was a member of the Painting and Decorators Contractors Association of Central Coast Counties (PDCA), a multi-employer bargaining group. Petitioner's painting employees were represented by District Council of Painters No. 33 (the Union) and were covered by the collective bargaining agreements between the Union and the PDCA. Pet. App. 8a.

On December 8, 1982, petitioner timely withdrew from the PDCA. It also advised the Union that it would terminate the 1980 PDCA contract when it expired on June 30, 1983. Pet. App. 8a.

On February 2, 1983, the Union asked petitioner to begin negotiations for a successor agreement covering its employees. Petitioner did not respond. On June 8, 1983, the Union again requested bargaining, and petitioner again failed to respond.[2] On June 29, a Union representative telephoned petitioner to inquire about negotiations. Petitioner stated that the company had not yet decided whether it would sign a successor agreement. Pet. App. 8a. The following day, petitioner advised the Union that it would not enter into

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[2]In early 1983, well before the Union's bargaining requests, petitioner's president, Victor Peterson, had already advised several of his employees that he was "contemplating going nonunion and [that] if he did so, they could continue working for him if they wanted to; that they would be offered benefits comparable to what the union gave them, including an IRA account to replace the Union's pension, and that he would treat them fairly." Thereafter, in May and June 1983, Peterson told various of his employees that he was "definitely going nonunion" and would not sign a successor contract with the Union. Pet. App. 19a.

negotiations for a new contract (*id.* at 8a, 22a). The parties never bargained for a successor agreement (*id.* at 8a).

The PDCA contract expired on June 30, 1983 (Pet. App. 8a). Immediately thereafter, petitioner withdrew recognition from the Union and stopped paying wages and benefits required under the contract, including payments to the Union trust funds (*id.* at 8a, 19a). Petitioner told its employees that it had gone nonunion and that it would not complete its union projects. Petitioner's six painting employees left the company because they wished to work on union jobs. *Id.* at 8a. In their place, petitioner hired new employees. It negotiated individual wage and benefit packages with each new employee, as well as with certain former employees whom petitioner eventually rehired. *Id.* at 8a, 19a.

2. Adopting with minor modifications the decision of the Administrative Law Judge (Pet. App. 11a-35a & n.3), the Board concluded that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1) and (5), by withdrawing recognition from and refusing to bargain with the Union; by unilaterally changing the wages and benefits of bargaining unit employees; and by dealing directly with unit employees concerning wages and benefits (Pet. 11a-12a, 27a). The Board also concluded that petitioner had constructively discharged its former employees by requiring them to forego union representation as a condition of continued employment, in violation of Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3) (Pet. App. 23a, 27a).

As a remedy, the Board ordered petitioner to recognize the Union as the exclusive representative of all bargaining unit employees and, on request, to bargain with the Union for a successor agreement. The Board further ordered petitioner to reinstate those employees that it had constructively discharged and to make each of them whole for any

loss of pay or other benefits. Finally, until such time as petitioner and the Union agreed to new terms and conditions or bargained to an impasse, the Board ordered petitioner to reinstitute, and apply to all unit employees, the terms and conditions of the expired agreement, including the duty to pay into the Union benefits funds those sums that would have been paid absent petitioner's violations. Pet. App. 25a-26a, 29a, 30a.[3]

3. The court of appeals, in an unpublished memorandum (see Pet. App. 7a n.*), unanimously enforced the Board's order (*id.* at 7a-10a). Noting that "[t]he Board's discretion to formulate an appropriate remedy is exceedingly broad" (*id.* at 9a), the court rejected petitioner's claim that the Board had exceeded its authority when it devised a remedy that covered employees hired by petitioner after June 30 (*ibid.*).[4] The court next distinguished (*id.* at 9a-10a) the decision in *Carpenter Sprinkler Corp.* v. *NLRB*, 605 F.2d 60 (2d Cir. 1979), on which petitioner had principally relied. The court of appeals observed (Pet. App. 9a-10a) that in *Carpenter Sprinkler* the Second Circuit had found a Board remedy excessive because the employer in that case had changed wages and benefits "only after substantial bargaining, a strike had occurred and * * * [the employer], in good faith, believed that a bargaining impasse had been reached." The court concluded (Pet. App. 10a) that none of those factors applied to petitioner. Rather, the court found (*ibid.*) that petitioner's conduct "approached brazen disregard for its employee's statutory rights."

[3]Petitioner was not required to make payments for those discharged employees who received benefits after June 30, 1983, from other employers who themselves made contributions to the benefit funds pursuant to a collective bargaining agreement with the Union (Pet. App. 26a).

[4]The court of appeals addressed only the question of remedy, since petitioner did "not deny that it [had] acted unlawfully" (Pet. App. 9a).

ARGUMENT

The court of appeals' decision is correct and is not in conflict with any decision of this Court or any other court of appeals. Further review by this Court is accordingly unwarranted.

1. Petitioner contends (Pet. 27-31) that the Board exceeded its statutory authority by ordering that the reinstituted terms and conditions cover not only the discharged employees but also those employees hired after June 30, 1983. Relying (*id.* at 29) on the "reinstatement" provisions of Section 10(c) of the Act, 29 U.S.C. 160(c), petitioner claims that the "remedial authority [of] * * * the Board is intended to be made applicable to those who were employed at the time of the unfair labor practice and who suffered from the resulting discrimination." Petitioner's contention is meritless.

As petitioner acknowledges (Pet. 25), Section 10(c) "charges the Board with the task of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346 (1953). "The Board's power is a broad discretionary one" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964)), and its chosen remedy will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)). Accord *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 193-194 (1941); *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 600 (1941).

In the present case, the Board ordered that petitioner's unilateral changes in the terms and conditions of employment be revoked and that the former contractual arrangements be reinstituted until new negotiations proved successful or reached an impasse. That decision was plainly

correct. Petitioner reached agreement with the new hires only by refusing to bargain with the Union. The Board's determination that petitioner should not enjoy the benefits of its unilateral contractual changes—even as those changes affected the new hires—clearly accords with the policy of the Act to discourage employers from unlawfully refusing to bargain with the representatives of their employees. See *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944) ("individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees"); *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 361 (1940) ("Since the contracts were the fruits of unfair labor practices * * * and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act").[5]

2. Petitioner asserts (Pet. 31-36) that the Board's order violates the due process and equal protection rights of the new hirees and also abridges their "freedom * * * [to] contract * * * advantageously with a nonunion employer" (*id.* at 37). These claims are frivolous. First, petitioner did not raise these claims in the court of appeals and is therefore disabled from pressing them now. See *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328-329 (1945) (per curiam); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935).

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[5]Petitioner is mistaken in contending that the portion of Section 10(c) authorizing a reinstatement remedy is somehow intended to limit the scope of the Board's remedial authority. By its terms, Section 10(c) identifies reinstatement only as an example of the kinds of remedies that the Board is entitled to impose. See *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. at 539 ("the Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. at 198-199.

In any event, employees do not have a "freedom * * * [to] contract * * * with a nonunion employer" (Pet. 37) where the scheme of the Act, including remedies otherwise properly imposed for an employer's past violations, obliges the employer to bargain with a union. Here, the remedy was properly imposed to protect the bargaining unit employees and to reinstitute the status quo ante in the bargaining unit until the employer satisfied his bargaining obligation by reaching a new agreement or bargaining to an impasse. And petitioner is simply mistaken in his belief that the reinstitution of the previous contractual terms will require the new hires to join the Union while a new agreement is being negotiated. See *NLRB* v. *Haberman Const. Co.*, 618 F.2d 288, 302 n.16 (5th Cir. 1980); *Cartwright Hardware Co.* v. *NLRB*, 600 F.2d 268, 272 (10th Cir. 1979); *Sun Oil Co.* v. *NLRB*, 576 F.2d 553, 558 (3d Cir. 1978).

3. Finally, petitioner speculates (Pet. 40-45) that the new hires may never join the Union, and thus the Board issued a "penal" (*id.* at 41) order when it required petitioner to make payments to the Union trust funds on behalf of all employees. But for petitioner's unlawful practices, however, contributions for all bargaining unit employees would have been made to the funds, including on behalf of those persons hired after June 30, 1983. Moreover, trust fund benefits are available to all bargaining unit members, regardless of union membership. Cf. *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 797-798 (2d Cir. 1974).[6]

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[6]For the reasons stated by the court of appeals (Pet. App. 9a-10a), petitioner's reliance on the Second Circuit's decision in *Carpenter Sprinkler* is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1987

(4)

No. 86-1543

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Are "make-whole" orders of the National Labor Relations Board issued after the expiration of the collective bargaining agreement in excess of the remedial authority conferred on the Board by Section 10(c) of the National Labor Relations Act in light of the recent decision of the Board in John Deklewa & Sons by which the Board radically altered the law applicable to this case?

2. Should the Supreme Court remand this matter to the Circuit Court of Appeals with directions to that court to further remand to the Board for modification of the decision in this case consistently with the Deklewa decision?

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ARGUMENT

1. Request of Limited Grant of Certiorari:

Consistently with Rule 22.6 and with counsel's continuing duty to inform the court of any developments which affect the outcome of a case, Fusari vs. Steinberg (1975), 419 U.S. 379, 391, petitioner is submitting this Supplemental Brief to seek a review of the case at bench in the light of the far reaching changes made in the applicable law by John Deklewa & Sons, 282 NLRB 184, 1986-87 CCH NLRB 18,549, decided on February 20, 1987. By this Supplemental Brief, petitioner is further requesting that this court grant the Writ of Certiorari on the limited basis of Deklewa and that as part of such limited grant of certiorari this court remand this case to the Circuit Court of Appeals with directions to that court to further

remand to the NLRB for redetermination of the issues and modification of the decision in the light of Deklewa. NLRB vs. Virginia Electric & Power Co., 314 U.S. 469 (1941); NLRB vs. Food Store Employees Union, 417 U.S. 1 (1974); Ace Beverage Co. vs. NLRB, 250 NLRB, page 646; 29 CFR 101.13(b). Thusly, this court will do (a) substantive justice by affording the Board and petitioner with the opportunity to cure what will otherwise be an economically disastrous error to petitioner and this court will (b) procedurally place this matter for redetermination before the Board where it should be.

2. Substantial Effects of Deklewa:

The decision of the National Labor Relations Board in John Deklewa & Sons, 282 NLRB 184, is being hailed as the most important development on construction industry labor laws since the 1959

amendments to the National Labor Relations Act. Clearly, it is a decision which, by its own expression, radically alters the rules related to Section 8(f) of the Act and to pre-hire agreements. For purposes of the case at bench, Deklewa would completely change the results and decision in that Deklewa abolishes the presumption of majority status with respect to 8(f) agreements at termination of the collective bargaining agreement and it leaves no doubt that at such termination the obligations that have been imposed on the employer in this case are no longer permissible.

There is no disagreement over petitioner's compliance with and adherence to all terms of the collective bargaining agreement until its expiration on June 30, 1983. The issue in this case arises as to the obligation of petitioner to continue to bargain with

the union to impasse to avoid the "make-whole order" of the type made in this case.

The decision of the Board, as confirmed by the Circuit Court of Appeals, was predicated upon the employer's obligation to continue to negotiate to enter into a successor agreement or to impasse after the termination of the prehire agreement. Deklewa clearly rejects such an obligation as being one that was contemplated by the Act; in so doing, the Board emphatically states that after expiration of the contract the employer (a) would have been privileged to announce an intention not to bargain with the union for a new contract; (b)would have been privileged to withdraw recognition from the union and (c) would have been privileged to implement unilateral changes. On those same

grounds, the Board made impermissible the "make-whole" type of orders issued in Deklewa when extended beyond the expiration date of the contract. That prohibition is no less applicable to the case at bench. In short, the very reasons for punishing Peterson Painting Company in the case at bench are made permissible by Deklewa.

3. Deklewa Infuses Life Into Petitioner's Arguments in Favor of Employees' Rights:

In the Petition for Writ of Certiorari, petitioner advanced the position that employees were being deprived of rights under the due process and equal protection of the laws in not being allowed the freedom to express themselves on such issues as "an agency shop" and "closed or union shop." (Pet. 32-40). The Board in Deklewa rejected the previous interpretations of 8(f)

agreements, embodied in R. J. Smith Construction Co., 191 NCR 693, and its progeny, for its failure to effectuate the type of employee's free choice that had been intended by Congress in the enactment of the law.

4. Retroactivity of Deklewa:

In deciding Deklewa, the Board expressed itself at length on the public policy in favor of extending retroactivity as much as possible to all pending cases in whatever stages they might have been at the time of the decision in Deklewa in order to avoid the imposition of obligations born out of errors.

The decision of the Board in the case at bench was affirmed by the Circuit Court of Appeals prior to Deklewa; hence, the Board would argue that it lacks jurisdiction on the question of purported unfair practices while having continuing

jurisdiction on the enforcement of the order pursuant to 29 U.S.C.A. 160(e) and (f); 29 C.F.R. 101.13(b). In order to avoid the possible bar of any relief to petitioner on that basis, it is essential that this court remand the case to the Circuit Court of Appeals with directions to that court to further remand to the Board for modification of the decision consistently with the Deklewa case and with case law that defers discretion to modify Board decisions to that body. NLRB vs. Food Store Employees Union (1974), 417 U.S. 1; NLRB vs. Virginia Electric & Power Co. (1941), 314 U.S. 469; International Union of Mine, Mill and Smelter Workers vs. Eagle Pitcher Mining and Smelting Co. (1945), 325 U.S. 335.

Respectfully submitted,

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(5)

No. 86-1543

In the Supreme Court of the United States

OCTOBER TERM, 1986

PETERSON PAINTING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In its supplemental brief, petitioner asks the Court to remand this case to the court of appeals with instructions that the court of appeals in turn remand it to the Board for reconsideration in light of the Board's decision in *John Deklewa & Sons*, 282 N.L.R.B. No. 184 (Feb. 20, 1987). There is no merit to that suggestion.

1. In *Deklewa*, the Board overruled certain of its prior decisions and held, in pertinent part, that upon the expiration of a pre-hire agreement under Section 8(f) of the National Labor Relations Act (the Act), 29 U.S.C. 158(f), "the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." *Deklewa*, 282 N.L.R.B. No. 184, at 8. The Board further held (*id.* at 40-42 (citation omitted)) that it would follow its "usual practice" and apply the decision in *Deklewa* retroactively "to all pending cases in whatever stage."

2. Petitioner has not shown that *Deklewa* has any application to its bargaining relationship with the Union. *Deklewa* applies where the bargaining relationship is based on Section 8(f) rather than actual majority status, which the Union enjoyed here.[1]

In any event, petitioner is not entitled to rely on *Deklewa*, having failed to assert before the Board that it had an 8(f) relationship with the Union. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused [by] extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). The fact that *Deklewa* had not been decided does not constitute "extraordinary circumstances" that excuse petitioner's failure to assert 8(f) status. As this Court has observed, even where an agency has "a predetermined policy * * * which would have required it to overrule the objection if made[,]" a litigant is required to raise an issue before the agency in order to preserve it for review. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

3. Finally, petitioner has misread (Supp. Br. 6) the Board's statement that *Deklewa* applies "to all pending cases in whatever stage." In elaborating in *Deklewa* on its "usual practice" governing retroactivity, the Board relied (282 N.L.R.B. at 42) on *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958), in which the Board stated (121

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[1]Petitioner conceded, and the Board found (Pet. App. 19a), that during the term of the agreement the Union in fact represented a majority of the employees in the multi-employer unit. The Board said that "the record affirmatively shows that the Union in fact represented all [of petitioner's] unit employees through June 30, 1983" (Pet. App. 19a-20a), when the contract expired and petitioner withdrew recognition from the Union.

N.L.R.B. at 1006) that it would apply new rules retroactively to any case "which has not yet been decided, because it has not reached the Board's level or is at one of the other stages of the administrative process such as the hearing." The present case was not, when *Deklewa* was decided, "pending" in this sense.

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JUNE 1987